STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096.	:	

VERIFIED BRIEF ON EXCEPTIONS ON REHEARING OF

THE ECONOMIC DEVELOPMENT INTERVENORS

COMPRISED OF:

THE ILLINOIS AFL-CIO,
THE CHICAGO & COOK COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL,
THE HISPANIC AMERICAN CONSTRUCTION INDUSTRY ASSOCIATION,
THE ILLINOIS COAL ASSOCIATION,
THE MECHANICAL CONTRACTORS ASSOCIATION,
THE ILLINOIS FAITH BASED ASSOCIATION,
PASTORS UNITED FOR CHANGE,
THE CALUMET AREA INDUSTRIAL COMMISSION, and
THE SOUTH CHICAGO CHAMBER OF COMMERCE

Michael A. Munson
Grant O. Jaskulski
Attorneys for the Economic Development Intervenors
LAW OFFICE OF MICHAEL A. MUNSON
22 West Washington Street, Suite 1500
Chicago, Illinois 60602
Telephone: (312) 854-8088
Facsimile: (312) 873-4154
E-mail: michael@michaelmunson.com
E-mail: grant@michaelmunson.com

Dated: May 1, 2012

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096.	:	

Pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission") and the April 24, 2012, Proposed Order on Rehearing (the "Proposed Order"), the Economic Development Intervenors ("EDI"), by and through their attorneys, the Law Office of Michael A. Munson, respectfully submit this Verified Brief on Exceptions on Rehearing in response to the Proposed Order. Additionally, the Economic Development Intervenors are also submitting Substitute Language to the Proposed Order, which is attached as Exhibit A.

I. INTRODUCTION

The Economic Development Intervenors represent the interests of working people in Illinois, particularly in and around the South Side of Chicago where the proposed coal substitute natural gas brownfield facility (the "SNG Facility") is to be built—unless the Commission, by entering a final order consistent with the Proposed Order, sabotages the overwhelming benefits that the SNG Facility would bring to the City of Chicago, the surrounding region, and the State of Illinois. Prior to this rehearing, the Commission put in jeopardy the significant and numerous advantages that the General Assembly intended to bring to Illinois through the SNG Facility by adopting the January 10, 2012, Order (the "January 10 Order"). The January 10 Order

significantly altered the final draft sourcing agreement that was transmitted from the Illinois Power Agency (the "IPA") to the Commission on October 11, 2012 (the "Sourcing Agreement").

The Commission's role has been specifically delegated by Public Acts 97-0096 and 97-0630. *See* P.A. 97-0096, 97th Gen. Assemb., Reg. Session (Ill. 2011); P.A. 97-0630, 97th Gen. Assemb., Reg. Session (Ill. 2011). The Commission's January 10 Order overstepped that role, causing both chambers of the General Assembly—the same General Assembly that passed Public Acts 97-0096 and 97-0630—to provide additional guidance to the Commission on rehearing through separate resolutions (the "Resolutions"). *See* H.R. 755 (Colvin-Madigan), 97th Gen. Assemb., Reg. Sess. (Ill. 2012); S.R. 585 (Trotter-Cullerton), 97th Gen. Assemb., Reg. Sess. (Ill. 2012). The intent behind this multitude of legislative materials emphatically shows that the Commission should approve the Sourcing Agreement as submitted by the IPA, with the sole exception of making small and discrete changes as defined by the Act.

Despite the several filings on rehearing that clarified and emphasized this legislative intent, the Proposed Order blatantly contradicts those intentions by overstepping the administrative role that the General Assembly prescribed to the Commission. The Proposed Order stubbornly continues down the path of the January 10 Order that would render constructing the SNG Facility unfinanceable. Accordingly, the Economic Development Intervenors respectfully request that the Commission make changes consistent with the below and attached substitute language to facilitate—not unnecessarily hinder—economic development in Illinois.

II. THE LANGUAGE OF THE PROPOSED ORDER IMPROPERLY EXCEEDS THE COMMISSION'S LIMITED AUTHORITY IN APPROVING THE SOURCING AGREEMENT

The Proposed Order runs contrary to the limited role given to the Commission by the General Assembly. Because the Commission is a creature of statute, its powers are strictly

limited to those explicitly given to it by the Public Utilities Act (the "Act"). *City of Chicago v. Ill. Commerce Comm'n*, 79 Ill. 2d 213, 217-18 (1980); *see also Lowden v. Ill. Commerce Comm'n*, 376 Ill. 225, 230 (1941) (holding that the sole power of the Commission stems from the statute, and it has power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute). In this case, the Commission's powers are limited to those given to it by Public Acts 97-0096 and 97-0630. This legislation significantly limits the Commission's role in approving the Sourcing Agreement, and anything beyond this limited scope in the Proposed Order should be revised to comport with the Commission's limited role in the complicated administrative construct between the IPA, the Capital Development Board, and the Commission. This role is the *sole* power of the Commission in this case, and the General Assembly has repeatedly reminded the Commission of its proper authority and scope in approving the Souring Agreement. It is time that the Commission listens to the General Assembly and follows the law.

A. The Commission Must Respectfully Consider the Limited Authority Given to It by the Legislature, as Evidenced in the Resolutions

The Commission must give respectful consideration to the Resolutions clarifying the Commission's limited role. As if the intent was not sufficient in the legislation alone, both chambers of the General Assembly passed Resolutions further emphasizing the Commission's limited role. *See* S.R. 585; H.R. 755. In those Resolutions, the General Assembly makes it abundantly clear that "[n]o statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-96 and 97-630." S.R. 585; H.R. 755. These Resolutions are not just useful guides—they are entitled to respectful consideration by the Commission. *See Miller v. LaSalle Bank Nat'l Ass'n*, 595 F.3d 782, 790

(7th Cir. 2010) (finding that while "the pronouncements of a subsequent legislative body on a prior statute are not binding, they are 'respectfully considered' when interpreting an unclear statute"). Not only do the Resolutions bring clarity to the complicated statute at the core of this proceeding, they were passed by the very same legislative session (i.e., the 97th), and such subsequent guidance deserves significant consideration. The General Assembly seldom deals with interpreting its own enacted laws—much less with adopting resolutions as direct and strongly words as the Resolutions here.

Moreover, these Resolutions merit particular consideration given the circumstances in which they were passed. Both Resolutions were passed in direct response to the Commission's January 10 Order. *See* S.R. 585; H.R. 755. Specifically, the Resolutions express the General Assembly's "serious concerns" that the January 10 Order improperly:

> (1) modifies the sourcing agreement's cost recovery provisions, despite a clear lack of authority and despite the statutory language and legislative intent of Public Act 97-0096 to provide full cost recovery;
>
> (2) fails to delete one of the two provisions for early termination that were contained in the sourcing agreements submitted to the Commission by the Illinois Power Agency; and
>
> (3) imposes an obligation to secure a third-party guarantee that is contemplated nowhere in statute, that exceeds the Commission's limited, and that is in addition to the substantial consumer protections already set forth in the statutory framework for the SNG Facility.

Id. The General Assembly then explicitly urged the Commission to, upon rehearing, "reach a decision that reflects statutory directives and the intent of the Illinois General Assembly in passing Public Acts 97-96 and 97-630." *Id.* If there was any confusion as to the Commission's authority under Section 9-220(h-4), the Resolutions should have sufficiently disposed of any such ambiguity. To properly decide this case under the authority given to it by the General Assembly, the Commission must reject all other proposed modifications to the Sourcing

Agreement, as well as reject any additional conditions the Proposed Order would place upon Chicago Clean Energy, LLC ("CCE").

Despite this clear legislative intent that has been reiterated to the Commission time and time again, the Proposed Order merely pays lip service to the Resolutions, superficially noting that the "Commission has reviewed those resolutions and, along with the information provided by the parties, given them appropriate consideration." Proposed Order at 28. Nowhere does the Proposed Order adequately give an adequate definition of this "appropriate consideration" given to the Resolutions; nor does the Proposed Order even acknowledge the extraordinary measures that the General Assembly has taken to guarantee that its intent be given effect. Instead, the Proposed Order completely disregards the legislative intent evidenced by the Resolutions and suggests that the Commission should improperly extend its authority beyond its discrete and limited role. The Commission's authority allows it only to make the specific changes allowed by Section 9-220(h-4), and to approve "*all other terms and conditions*, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement." 220 ILCS 5/9-220(h-4) (emphasis added).

The Economic Development Intervenors are simply asking the Commission to do that which it has been tasked: Approve the Sourcing Agreement as submitted by the IPA, with the exceptions of the minimal and discrete changes explicitly authorized by the Section 9-220(h-4). The Proposed Order exceeds this limited authority, and, accordingly, it must be revised to reflect the limited authority given to the Commission by the General Assembly, as evidenced by the Resolutions.

B. The Commission Only Has Authority to Undertake the Tasks Explicitly Given to It by the Legislature

The General Assembly specifically and discretely delegated certain roles to the Commission in approving the Sourcing Agreement as part of a complicated arrangement between several administrative bodies. As the principal Senate and House sponsors of the legislation that enabled the SNG Facility, have pointed out, the numerous Public Acts that eventually came to a head in this proceeding are the result of a complicated set of concessions and negotiations designed to balance a variety of interests between competing parties and administrative agencies. *See* EDI Brief on Exceptions, Ex. A at 3 (Dec. 27, 2011). These tasks were explicitly set out in the legislation and are codified in Section 9-220(h-4). *See* 220 ILCS 5/9-220(h-4). The Commission's limited role has been developed by the General Assembly, approved by the Governor, and further reinforced by both the Senate and House of Representatives through the Resolutions. *See* P.A. 97-0096; P.A. 97-0630; S.R. 585; H.R. 755. This legislation requires—and accordingly limits—the Commission to approve the Sourcing Agreement with "the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3)" and then approve the remainder of the Sourcing Agreement with no changes aside from correcting typographical and scrivener's errors and removing any provisions that would impermissibly allow the Sourcing Agreement to be terminable. 220 ILCS 5/9-220(h-4). Outside of these distinctly limited tasks, the Commission has absolutely no authority to alter any other language to the Sourcing Agreement.

These tasks, nevertheless, are integral to approving the Sourcing Agreement, and the Proposed Order adequately utilizes the Commission's expertise in this area to correctly apply the Act to these limited roles. However, where the Proposed Order exceeds these limited and discrete roles, it must be amended. As the Resolutions have succinctly noted, "the Illinois

Commerce Commission, in review and approving sourcing agreements, was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return for the Chicago Clean Energy project; (2) remove 2 statutorily unauthorized early termination provisions from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors." S.R. 585; H.R. 755. To the extent practicable, the Economic Development Intervenors have maintained the Proposed Order's language to the extent that it gives effect to the Commission's limited statutory roles.

The Proposed Order improperly exceeds the Commission's authority, despite the clear legislative intent and long-accepted jurisprudence to the contrary. Specifically, the Proposed Order substantively contradicts the Commission's limited role by improperly: (1) finding implicit authority to establish billing determinants for the capital recovery and operations and maintenance charges, *see* Proposed Order at 28; and (2) modifying the Sourcing Agreement to reduce the percentage cost recovery, *see id.* at 29. Elsewhere, despite substantive decisions that would comport with the Economic Development Intervenors' intentions, the Proposed Order incorrectly notes that the Commission will not agree to its limited authority. *See, e.g., id.* at 30. As reflected in the substitute language included with this Brief on Exceptions on Rehearing, the Economic Development Intervenors urge the Commission to follow the direction of the General Assembly by acknowledging and embracing its limited authority in approving the Sourcing Agreement.

The Commission is not authorized to establish billing determinants for the capital recovery and operations and maintenance charges. The Proposed Order brazenly rejects what it deems to be a "suggestion [that] it lacks such authority." *Id.* at 28. There is no suggestion here; there is a legislative mandate and clear legislative guidance. The Commission cannot simply find

implied powers in the legislative scheme that governs it. *See Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60 (1st Dist. 2010). To the contrary, the "Commission derives its power and authority *solely* from the statute creating it, and it may not, by its own acts, extend its jurisdiction." *Id.* (emphasis added); *see also Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523 (5th Dist. 2003). Section 9-220(h-4) not only limits the Commission's authority to modify the Sourcing Agreement, it explicitly establishes the few areas where the Commission may make any changes to the Sourcing Agreement. *See* 220 ILCS 5/9-220(h-4). Beyond these explicit limitations, the Commission does not have any authority to make any alterations to the Sourcing Agreement.

To the contrary, the Proposed Order creates an implied power and extends its jurisdiction to billing determinants through an unsupported reasoning of necessity. *See* Proposed Order at 28. As noted in the resolutions, the "Illinois Appellate and Supreme Courts have consistently held that public policy in Illinois is expressed by the General Assembly, and it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature's act or to substitute its own judgment for that of the legislature." S.R. 585; H.R. 755. As a corollary, it is not the province of the Commission to review the Sourcing Agreement beyond the narrowly defined scope of Section 9-220(h-4), and without specific guidelines, general provisions in the Act do not authorize the Commission, as an administrative agency, to review the decisions of the IPA, another administrative agency. *See Landfill, Inc. v. Pollution Ctl. Bd.*, 74 Ill. 2d 541, 558-59 (1978).

The General Assembly has been clear on to the limited roles assigned to each of the administrative agencies throughout this proceeding, and the Commission must respect that delegation. Had the General Assembly intended that the Commission amend the Sourcing

Agreement with regard to billing determinants, it could have granted such authority through Public Act 97-0630, which was introduced, passed with super-majorities in both chambers, and signed into law *after* the IPA had approved billing determinants in the Sourcing Agreement. However, the General Assembly instead limited the Commission's authority and required it to approve "all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement." P.A. 97-0630. Moreover, the Resolutions adopted after the January 10 Order further clarify this limitation by expressing "serious concerns that the Illinois Commerce Commission Order . . . modifies the final draft sourcing agreement with respect to recovery of costs despite the Commission lacking statutory authority to do so and despite the statutory language and legislative intent of Public Act 97-96 to provide full cost recover to the Chicago Clean Energy project." S.R. 585; H.R. 755. By substituting its own judgment for that of the General Assembly, the Commission disregarded this express limitation and overstepped its legal authority. Therefore, the Proposed Order must be amended in the Final Order on Rehearing.

Additionally, the Proposed Order improperly modifies the Sourcing Agreement to reduce the percentage cost recovery by struggling to fit the recovery into its definition of a scrivener's error. *See* Proposed Order at 29. As previously noted by the Economic Development Intervenors, *see* EDI's Verified Reply Comments on Rehearing at 6 (April 16, 2012), a more apt definition of "scrivener's error" than that used in the Proposed Order is that from Black's Law Dictionary which the Illinois Appellate Court has cited to illustrate the same point. *See, e.g., Schaffner v. 514 W. Grant Place Condo. Ass'n*, 324 Ill. App. 3d 1033, 1040 (1st. Dist. 2001). The entry for "scrivener's error" in Black's Law Dictionary refers to "clerical error." *See* Black's Law Dictionary 1375 (8th ed. 2004). This definition, then, is more applicable to this situation:

> An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination. ● Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call.

Id. at 582. The examples included in this definition—and also cited by the court in *Schaffner*—are all "mechanical or technical in nature, not decisional or judgmental." *Schaffner*, 321 Ill. App. 3d at 1040. In this case, the Proposed Order is attempting to recharacterize substantive after-the-fact policy changes in the percentage costs recovery as scrivener's errors. The Economic Development Intervenors again urge the Commission to adopt this definition of "scrivener's error," and find that the percentage cost recovery, as included in the Sourcing Agreement from the IPA, be adopted by the Commission in its final order.

III. CONCLUSION

The Economic Development Intervenors respect that it is the Commission's responsibility to first interpret the Act. *See* Proposed Order at 28. However, the Proposed Order would improperly misinterpret the Act and find implied authority that the Commission does not—and cannot—have. Not only has the General Assembly explicitly given the Commission limited powers through legislation, both chambers of that General Assembly have emphatically reminded the Commission through the Resolutions that it should not—and cannot—ignore those limited powers. The Economic Development Intervenors have thus prepared substitute language for the Proposed Order that would give effect to the intent of the General Assembly, as reflected both in Public Acts 97-0096 and 97-0630, and also as echoed in the subsequent Resolutions.

WHEREFORE, for the reasons stated herein and within their other submissions in this proceeding, the Economic Development Intervenors respectfully request that the Commission modify the Proposed Order on Rehearing consistently with the positions of this Verified Brief on Exceptions on Rehearing and with the Substitute Language included herein as Exhibit A.

Respectfully submitted,

THE ECONOMIC DEVELOPMENT INTERVENORS,
comprised of
THE ILLINOIS AFL-CIO,
THE TRADES COUNCIL,
HACIA,
THE ILLINOIS COAL ASSOCIATION,
THE MECHANICAL CONTRACTORS ASSOCIATION,
THE ILLINOIS FAITH BASED ASSOCIATION,
PASTORS UNITED FOR CHANGE,
THE CALUMET AREA INDUSTRIAL COMMISSION,
and
THE SOUTH CHICAGO CHAMBER OF COMMERCE

By: 

One of their attorneys

Michael A. Munson
Grant O. Jaskulski
Attorneys for the Economic Development Intervenors
LAW OFFICE OF MICHAEL A. MUNSON
22 West Washington Street, Suite 1500
Chicago, Illinois 60602
E-mail: michael@michaelmunson.com
E-mail: grant@michaelmunson.com

Dated: May 1, 2012